



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID: DoD-2021-OS-0048]

RIN 0790-AL13

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary of Defense (OSD), Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The Department of Defense (Department or DoD) is issuing a final rule to amend its regulations to exempt portions of the system of records titled DoD-0008, “Freedom of Information Act and Privacy Act Records,” from certain provisions of the Privacy Act of 1974.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Rahwa Keleta, Privacy and Civil Liberties Division, Directorate for Privacy, Civil Liberties and Freedom of Information, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Department of Defense, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700; OSD.DPCLTD@mail.mil; (703) 571-0070.

SUPPLEMENTARY INFORMATION:

DISCUSSION OF COMMENTS AND CHANGES

The proposed rule published in the Federal Register (86 FR 72536-72540) on December 22, 2021. Comments were accepted for 60 days until February 22, 2022. A total of two comments regarding the proposed rule were received. Please see a summary of the comments and the Department’s response below:

DoD received one substantive comment and one non-substantive comment on the NPRM. The substantive comment expressed a concern that the application of exemptions to this system of records would globally shield all FOIA case processing records from disclosure. This rulemaking would not globally or improperly shield a requester's ability to seek access to the case processing of records of a FOIA or Privacy Act case. The Privacy Act (5 U.S.C. 552a) generally provides that any person has a right (enforceable in court) of access to federal agency records about themselves, except to the extent that the information is *protected from disclosure* by one of ten exemptions. To the extent that the case processing records are "records" as defined in the Privacy Act to which an individual has a Privacy Act right of access, this rule will deny the individual access to those records only to the extent a claimed exemption applies. In addition, records in the DoD-0008 Freedom of Information Act and Privacy Act Records system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record. Applying Privacy Act exemptions allows agencies to withhold records from access for particular reasons as articulated by the exemption rule. Having considered the public comment, the Department will implement the rulemaking as proposed.

I. Background

In finalizing this rule, DoD is seeking to exempt portions of this system of records titled, DoD-0008 Freedom of Information Act and Privacy Act Records, from certain provisions of the Privacy Act. This system of records covers DoD's maintenance of records about individuals who submit access requests and administrative appeals under the Freedom of Information Act, and who submit access and amendment requests and administrative appeals under the Privacy Act. This system of records data includes information regarding the individual requesters and their attorneys or representatives, the original request for access and any administrative appeal, and other supporting

documentation to include related memoranda, correspondence, notes, and, in some instances, copies of requested records and records under administrative appeal.

II. Privacy Exemption

The Privacy Act permits Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including the provisions providing individuals with a right to request access to and amendment of their own records and accountings of disclosures of such records. If an agency intends to exempt a particular system of records, it must first go through the rulemaking process to provide public notice and an opportunity to comment on the proposed exemption. The OSD is amending 32 CFR part 310 to add a new Privacy Act exemption rule for this system of records. The DoD is adding an exemption for this system of records because some of its records may contain investigatory material compiled for law enforcement purposes, classified national security information, protective services information pursuant to 18 U.S.C. 3056, and testing or examination information pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(5), (k)(6), and (k)(7). The DoD is claiming an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain recordkeeping and notice requirements, to avoid, among other harms, frustrating the underlying purposes for which the information was gathered.

Regulatory Analysis

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of

harmonizing rules, and of promoting flexibility. It has been determined that this rule is not a significant regulatory action under these Executive Orders.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. DoD will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule may take effect no earlier than 60 calendar days after Congress receives the rule report or the rule is published in the Federal Register, whichever is later. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. Chapter 6)

The Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule is concerned only with the administration of Privacy Act systems of records within the DoD. Therefore, the Regulatory Flexibility Act, as amended, does not require DoD to prepare a regulatory flexibility analysis.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that this rule does not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates may result in the expenditure by State, local and tribal governments in the aggregate, or by the private sector, in any one year of \$100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Executive Order 13132, “Federalism”

It has been determined that this rule does not have federalism implications. This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or effects the distribution of power and responsibilities between the federal government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is amended as follows:

**PART 310--PROTECTION OF PRIVACY AND ACCESS TO AND
AMENDMENT OF INDIVIDUAL RECORDS UNDER THE PRIVACY ACT OF
1974**

1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

2. Section 310.13 is amended by adding paragraph (e)(7) to read as follows:

§ 310.13 Exemptions for DoD-wide systems.

* * * * *

(e) * * *

(7) *System identifier and name:* DoD-0008, “Freedom of Information Act and Privacy Act Records”

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1); (e)(2); (e)(3); (e)(4)(G), (H), and(I); (e)(5); (e)(8); (f) and (g).

(ii) *Authority:* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(5), (k)(6), and (k)(7).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsection (c)(3), (d)(1), and (d)(2)--(1) Exemption (j)(2).* Records in this system of records may contain information recompiled from other systems of records maintained by a DoD component or other agency which performs as its principal function activities pertaining to the enforcement of criminal laws and contain investigatory material compiled for criminal law enforcement purposes, including information identifying criminal offenders and alleged offenders, information compiled for the purpose of criminal investigation, or reports compiled during criminal law enforcement proceedings. Application of exemption (j)(2) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties or disciplinary measures;

reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD or the other agency's ability to obtain information from future confidential sources and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(2) *Exemption (k)(1)*. Records in this system of records may contain information that is properly classified pursuant to executive order. Application of exemption (k)(1) may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information.

Disclosure of classified records to an individual may cause damage to national security.

(3) *Exemption (k)(2)*. Records in this system of records may contain information recompiled from other systems of records pertaining to investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could: inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records or the accounting of records to avoid criminal penalties, civil remedies, or disciplinary measures; interfere with a civil or administrative action or investigation by allowing the subject to tamper with witnesses or evidence, and to avoid detection or apprehension, which may undermine the entire investigatory process; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others.

Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(4) *Exemption (k)(3)*. Records in this system of records may contain information recompiled from other systems of records pertaining to providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056. Application of exemption (k)(3) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could compromise the effectiveness of protective services, the safety of the individuals protected pursuant to 18 U.S.C. 3056, and the safety of the personnel providing protective services.

(5) *Exemption (k)(5)*. Records in this system of records may contain information recompiled from other systems of records concerning investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information. In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(5) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise come forward to assist the Government; hinder the Government's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(6) *Exemption (k)(6)*. Records in this system of records may contain information recompiled from other systems of records relating to testing or examination material used

solely to determine individual qualifications for appointment or promotion in the Federal service. Application of exemption (k)(6) may be necessary when access to and amendment of the records, or release of the accounting of disclosure for such records, may compromise the objectivity and fairness of the testing or examination process. Amendment of such records could also impose a highly impracticable administrative burden by requiring testing and examinations to be continuously re-administered.

(7) *Exemption (k)(7)*. Records in this system of records may contain evaluation material recompiled from other systems of records used to determine potential for promotion in the Armed Forces of the United States. In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(7) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise come forward to assist the Government; hinder the Government's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others.

(B) *Subsection (c)(4), (d)(3) and (4)*. These subsections are inapplicable to the extent that an exemption is being claimed from subsections (d)(1) and (2).

(C) *Subsection (e)(1)*. In the collection of information for investigatory or law enforcement purposes, it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the investigation or adjudication. In some instances, it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective investigation and adjudication can be assessed. Collection of such information permits more informed decision-making by the Department when making required disciplinary

and prosecutorial determinations. Additionally, records within this system may be properly classified pursuant to executive order. Further, it is not always possible to determine relevancy or necessity of specific information in the earlier stages of responding to a FOIA or Privacy Act request or in litigation case development, including with respect to records pertaining to suitability determinations or armed services promotion evaluations that contain information about sources who were granted an express promise of confidentiality, or pertaining to testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process. Such information may later be deemed unnecessary upon further assessment. Accordingly, application of exemptions (j)(2), (k)(1), (k)(2), (k)(3), (k)(5), (k)(6), or (k)(7) may be necessary.

(D) *Subsection (e)(2)*. To collect information from the subject individual could serve notice that he or she is the subject of a criminal investigation and thereby present a serious impediment to such investigations. Collection of information only from the individual accused of criminal activity or misconduct could also subvert discovery of relevant evidence and subvert the course of justice. Accordingly, application of exemption (j)(2) may be necessary.

(E) *Subsection (e)(3)*. To inform individuals as required by this subsection could reveal the existence of a criminal investigation and compromise investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(F) *Subsections (e)(4)(G) and (H)*. These subsections are inapplicable to the extent an exemption is claimed from subsections (d)(1) and (2).

(G) *Subsection (e)(4)(I)*. To the extent that this provision is construed to require more detailed disclosure than the broad information currently published in the system notice concerning categories of sources of records in the system, an exemption from this

provision is necessary to protect the confidentiality of sources of information, the privacy and physical safety of witnesses and informants, and testing or examination material used solely to determine individual qualifications for appointment of promotion in the Federal service. Accordingly, application of exemptions (j)(2), (k)(1), (k)(2), (k)(5), (k)(6), and (k)(7) may be necessary.

(H) *Subsection (e)(5)*. It is often impossible to determine in advance if investigatory records contained in this system are accurate, relevant, timely and complete, but, in the interests of effective law enforcement, it is necessary to retain this information to maintain an accurate record of the investigatory activity to preserve the integrity of the investigation and satisfy various Constitutional and evidentiary requirements, such as mandatory disclosure of potentially exculpatory information in the investigative file to a defendant. It is also necessary to retain this information to aid in establishing patterns of activity and provide investigative leads. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined through judicial processes. Accordingly, application of exemption (j)(2) may be necessary.

(I) *Subsection (e)(8)*. To serve notice could give persons sufficient warning to evade investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(J) *Subsection (f)*. To the extent that portions of the system are exempt from the provisions of the Privacy Act concerning individual access and amendment of records, DoD is not required to establish rules concerning procedures and requirements relating to such provisions. Accordingly, application of exemptions (j)(2), (k)(1), (k)(2), (k)(5), (k)(6), and (k)(7) may be necessary.

(K) *Subsection (g)*. This subsection is inapplicable to the extent that the system is exempt from other specific subsections of the Privacy Act to which the civil remedies provisions pertain.

(iv) *Exempt records from other systems*. In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

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Dated: August 16, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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